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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 781

SEARS, ROEBUCK AND CO.,

and

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO., *Petitioners*,

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

and

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*.

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

INTEREST OF THE AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and

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* This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000. It is the largest association of business and professional organizations in the United States.

The National Chamber has previously submitted its views with respect to the issue involving this case, the rights of charging parties to participate in an injunction proceeding under Section 10(L) of the National Labor Relations Act, in *The Los Angeles Herald-Examiner, et al.* v. *Kennedy*, No. 350, this term. The subsequent grant of the petition for writ of certiorari in that case, coupled with the acceptance of a similar petition last term in *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers*, 397 U.S. 655, indicates this Court's awareness of the importance of defining the status of a charging party in a 10(L) case.

The problem here presented is thus a substantial and recurring one,[1] and one which has to date escaped review by this Court by reason of a technical application of the mootness doctrine. The National Chamber believes that the instant case now presents an appropriate vehicle for this Court to provide the necessary guidance. If a large national enterprise such as Sears, Roebuck and Co., exercising all possible diligence and expedition (See Petition, footnote 7), is repeatedly frustrated in its attempt to obtain review by this Court, there is surely little hope for the countless thousands of similarly-situated small employers throughout the

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[1] Of the total unfair labor practice charges filed against unions under Section 8(b) of the Act during NLRB fiscal years 1967 and 1968, *32 per cent, or nearly 3700 charges*, involved alleged violations of the secondary boycott provisions of Section 8(b)(4). *Thirty-second Annual Report of the National Labor Relations Board*, p. 218 (1967); *Summary of Operations of NLRB General Counsel*, reprinted in 70 LRR 459 at 468 (1969).

nation who cannot pursue as actively such litigation.[2] This case has not yet been rendered moot, and the critical issue involved remains a viable one raised in an appropriate posture for review by this Court. This case, therefore, presents the situation contemplated by Rule 20 of this Court for the grant of a writ of certiorari before judgment: a matter of such imperative public importance as to justify a deviation from normal appellate processes and to require immediate settlement by this Court. There is no need here to await the decision of the Court of Appeals; the merits of the matters at issue have already been extensively argued to this Court. See Petition, pp. 9-11.

REASONS FOR GRANTING THE WRIT

A. The Present Case Raises Significant Issues Regarding the Administration of the Act Which Should Be Resolved by This Court in the Exercise of Its "General Power To Supervise the Administration of Justice in the Federal Courts." Western Pacific R. Corp. v. Western Pacific R. Co., 345 U.S. 247, 260.

Congress has recognized that the secondary boycott is a vicious and devastating economic weapon;[3] it is destructive to the free flow of commerce and places the neutral employer in grave jeopardy of losing all or part of his established business. Accordingly, Congress not only outlawed such conduct, but provided an immediate remedy for the protection of the victimized employer by the enactment of Section 10(L) of the National Labor Relations Act, 29 U.S.C. § 160(e).

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[2] Over 50% of all charges involving Section 10(L) in 1959 were filed by small employers with less than 30 employees. *Thirty-third Annual Report of the National Labor Relations Board*, Table 18, pp. 238-9, *supra*.

[3] See, e.g., II *Legislative History of the Labor-Management Reporting Act of 1959*, pps. 989, 1376, 1425, 1446, 1842 (1959); Senate Report No. 105, 80th Cong., 1st Sess. (1947).

This provision particularly reflects the sense of grave congressional concern that such conduct be terminated. Unlike other provisions of the federal laws, this section:

1. Commands the Board to give the investigation of such charges immediate priority over all other charges, and

2. Orders the Board, without exception or allowance for discretion, to petition a federal district court for temporary injunctive relief pending final adjudication upon a showing of reasonable cause to support the merits of the charge.

Indeed, the protection afforded by temporary injunctive proceedings under Section 10(L) constitutes the *only* effective bulwark available to employers subjected to unlawful union recognitional picketing, improper "hot-cargo" agreements and illegal secondary boycotts.[4]

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[4] The protection afforded by a permanent injunction to an employer unlawfully picketed is more illusory than real. The length of time required for the Board to investigate the employer's charge and to issue a complaint, for the Board Trial Examiner and the Board itself to then rule on the complaint and, subsequently, for a court of appeals to enforce any resultant Board order, largely negates the value to the picketed employer of such a proceeding. In *Sears, supra*, for example, the union commenced its picketing on August 7, 1968; only recently, however, did the District of Columbia Court of Appeals issue its order remanding the case back to the Board for additional findings. *Carpet Layers Local 419* v. *N.L.R.B. (Sears, Roebuck & Co.)*, — F. 2d —, 74 LRRM 2444 (D.C.Cir., 1970). Thus far, in excess of two years have elapsed with the legality of the underlying dispute still unresolved. Few employers could withstand unlawful picketing of such a duration. Nor can it be said that the delay involved in the *Sears* case presents the unusual situation. See footnote 8 at page 10 of the Petition for Rehearing in *Sears, supra*.

In the face of such a clear congressional purpose, any erosion of the effectiveness of the Section 10(L) remedy cannot be sanctioned. Yet this will be the result of the failure to accord charging parties the status of full "parties", or to permit their right of intervention, in Section 10(L) proceedings. This Court has acknowledged the necessity for conferring such status upon charging parties in proceedings under other provisions of the Act. See, e.g., *United Automobile Workers* v. *Scofield*, 382 U.S. 205. A similar role, as Petitioners suggest, is also contemplated by the Judicial Review Act, 5 U.S.C. § 1038.[5] And a recognition that important private rights, not merely generalized "public rights", are at stake is particularly critical in a 10(L) proceeding where, once the government has instituted suit, the interest of the neutral employer—the strong self-interest of preserving his business—assures the most vigorous pursuit of the injunctive remedy to halt the unlawful picketing.

This Court has determined that "both the successful charged party (in *Scofield*) and the successful charging party (in *Fafnir*) have a right to intervene in a Court of Appeals proceeding which reviews or enforces Labor Board orders." *United Auto Workers* v. *Scofield*, 382 U.S. at 208. This Court has not, however, determined the corollary and equally important extent to which charging parties may participate in proceedings instituted by the Board for temporary injunctive relief or may participate in subsequent appellate review in such proceedings. Accordingly, numerous and

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[5] See also this Court's recent sensitivity to the rights of private parties in administrative proceedings generally, as expressed in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 and *Barlow* v. *Collins*, 397 U.S. 159.

divergent rulings have emerged from the courts of appeal concerning this and related questions.[6] Such conflicts, involving significant issues in the administration of the Act, should be resolved by this Court in the exercise of its "general power to supervise the administration of justice in the Federal Courts." *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 260.

B. The Decision of the District Court Hinders the Public Interest by Suppressing Evidence and Argument Before the Courts in 10(L) Proceedings.

If the decision of the District Court here is allowed to stand, one of the essential objectives of the Act will be frustrated to the detriment of the public interest. Congress entrusted the keys of the closely-guarded labor injunction to the federal district courts in much the same fashion that enforcement of Board orders was reposed in the courts of appeal. That grant of judicial authority was predicated upon the explicit premise that all parties would have unrestricted opportunity to inform the court, by evidence and argument, of all relevant considerations in a given case. This division of responsibility was acknowledged by the Board and expressly recognized by the Court in *Scofield* where it was stated:

> "In fact, the Labor Board itself agrees that intervention by charged parties will not impair

[6] To give one example: in contrast to the ruling of the District Court here, the Ninth Circuit has affirmed the issuance of an injunction under Section 10(L) at the urging of the charging party and over the objection of the Board where the charging party "merely supported the original petition for injunctive relief requested by the Regional Director". *Retail Clerk's Union, Local 137, et al.* v. *Food Employers Council, Inc.*, 351 F. 2d 525 9th Cir., 1965).

> effective discharge of its duties and may well promote the public interest . . . Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful."

There can be no logical reason for applying the *Scofield* doctrine to one stage of an unfair labor practice proceeding but refusing, as did the District Court, to apply it to closely-related injunction sections. If anything, the more logical postulate is that Congress wanted the fullest possible exposure of facts and arguments in light of the limited time available to the court for consideration of its ruling in a 10(L) proceeding and the overriding concern of Congress regarding the need for relief for such violations. Thus, the decision of the District Court denying the charging party either the status of a "party" or the right of intervention is clearly contrary to the public interest facet of the statutory scheme and, accordingly, review by this Court is fully warranted.

C. The Decision of the District Court Departs from the Better-Reasoned Precedent.

The decision of the Ninth Circuit Court of Appeals in *Retail Clerk's Union, Local 137, et al.* v. *Food Employers Council, Inc.*, 351 F.2d 525 (9th Cir., 1965), fully and logically supports the position of the Petitioners here. In that decision, the court reasoned that, since the charging party was only attempting to "support the position of the Regional Director" and was not seeking to "initiate the litigation," the Norris-LaGuardia Act presented no obstacle. Here also, Petitioners are merely seeking to support the position of the Regional Director who has initiated the appeal and

the Norris-LaGuardia Act should not be read as obstructing such participation.

Review is warranted here for the additional reason that, as this Court held last term in *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770,* 398 U.S. 235, the earlier enacted provisions of the Norris-LaGuardia Act must be accommodated to the subsequent amendments to the National Labor Relations Act. In enacting Section 10(L), Congress expressed a clear purpose of protecting the neutral employer from the disruptive effects of unlawful union picketing. The participatory rights granted neutral employers by the explicit terms of Section 10(L) reflects the judgment of Congress that the prosecutorial efforts of the Board's General Counsel alone would not guarantee such protection. As in *Boys Markets,* the earlier enacted provisions of the Norris-LaGuardia Act cannot be interpreted here as contravening this clear congressional objection by stifling the neutral employer's right to participate at all stages of 10(L) injunctive proceedings. Rather, as the Court said in *Boys Markets,* it is "the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." The District Court failed to reach such an accommodation, and, accordingly, review by this Court is now necessary.

CONCLUSION

For the foregoing reasons, as well as for those urged by the Petitioner, the National Chamber urges this Court to grant the petition for a Writ of Certiorari Before Judgment.

Respectfully submitted,

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